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Supreme Court of the United States

OCTOBER TERM, 1964

No. 1036

ALLAN HERSCHELL CO., INC. and UTICA MUTUAL INSURANCE COMPANY,
Petitioners,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY, and DONALD R. BRIAN, TUTOR OF, AND FOR THE USE AND BENEFIT OF HIS MINOR CHILD, NANCY BRIAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners seek certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of their petition respectfully show:

OPINION BELOW and JURISDICTION

The case was tried to a jury, which found in favor of petitioners and respondent Brian, and against respondent United States Fidelity and Guaranty Company.

The Court of Appeals for the Fifth Circuit rendered its opinion on October 16, 1964, reversing the judgment entered on the verdict, and remanding for a new trial of all issues. The opinion of the Court of Appeals is reported at 337 F2d 881, and is printed in the Appendix hereto.

The Court of Appeals granted petitioners' application for clarification of its decision but denied petitioners' petition for rehearing. The opinion amending the prior decision is reported at 339 F2d 602, and is printed in the Appendix hereto. Jurisdiction of this Court lies under 28 USC 1254.

QUESTION PRESENTED

> May the special verdicts of the jury finding petitioner Herschell*, as manufacturer-designer, free from negligence or from breach of warranty, be set aside by the Court of Appeals merely because it feels that such special verdicts were either inconsistent or unsupported by the evidence, in view of the jury's further special verdicts that the owner-operator of the machine was negligent and liable to respondent Brian (plaintiff below)?

The grounds for this petition are that the Court of Appeals has rendered a decision in a way in such conflict with applicable decisions of this Court and with a decision of the Court of Appeals for the Third Circuit, as to call for an exercise of this Court's power of supervision.

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* The other petitioner, Utica Mutual Ins. Co., is the Herschell Company's liability insurer, brought in under Louisiana's Direct Action Statute, RS 22:655.

This Court has made it clear that in federal jury trials the constitutional division of function between court and jury must be strictly respected.

Both trial and appellate courts must, if possible, view the jury's answers to special interrogatories in a way that will make them consistent. A search by a court, especially an appellate court, for the one possible view of the case which will make the several findings of a jury either inconsistent or without support in the record, is contrary to the Seventh Amendment.

The circumstances of this case raise a serious question, within the appropriate purview of this court's supervision, whether the Court of Appeals has not here sought for a possible inconsistency in the jury's several findings, and thus has set aside the findings of the jury in favor of petitioners, even though those findings find support in the record. The Court of Appeals' own opinion indicates that it is not certain whether the findings in favor of petitioners are "inconsistent (with findings of negligence on the part of the operator) or unsupported by the evidence". (Appendix, p. 16).

STATEMENT OF THE CASE

Plaintiff Brian sued United States Fidelity and Guaranty Company (USF&G) under the Louisiana Direct Action Statute (RS 22:655), as the insurer of Playland Amusements Inc. (Playland), the operator of an amusement ride on the shore of Lake Pontchartrain in New Orleans. (R 9) Brian's 15-year old daughter had placed

her foot between the bars under her seat on the ride, and the foot had been injured when it went below the floor of the ride (Appendix p. 12). USF&G brought in the manufacturer of the ride Allan Herschell Co., Inc. (Herschell), and its insurer, The Utica Mutual Insurance Company (Utica), by third-party complaint, claiming indemnity against Brian's claim on the ground of negligence or breach of warranty at the time the manufacturer sold the ride to Playland in 1950, eleven years prior to the accident.

During these eleven years Playland had complete control of the operation and maintenance of the ride.[1] The opening in the floor under the seat remained the same from the time Herschell sold the ride to Playland until the date of the accident. (Appendix, p. 13).

Prior to trial plaintiff amended his petition to claim also against Herschell and its insurer Utica as defendants.

The jury found that petitioner Herschell was not guilty of negligence, that it had not breached its warranty to Playland, that Playland was guilty of negligence and that Brian should recover from Playland.[2]

There is no dispute in the record that Herschell, after selling the ride to Playland in 1950, had no further part in maintaining, inspecting or repairing the ride.[3] Playland's superintendent of maintenance and his crew had

[1] Appendix, p. 13. The opinion inadvertently states that the purchase was in 1951. (See R 191).
[2] See Appendix (R 374-75).
[3] R 195, 212-13.

taken care of the ride during the eleven years of operation(R 194-95).

No complaint was made by Playland to Herschell during the eleven years(R 215-16); and Playland proved that it had not had such an accident as to any of the 1,500,000 patrons who had used the ride prior to Miss Brian(R 195). Similar rides had been used by some 5,000,000 people in five locations throughout the United States and Canada during the eleven years prior to the accident, and no similar accident had been reported during that time (R 243).

The only expert witness testified that the ride was "well designed . . . and safe . . ." (R 245).

The jury had viewed the car in question and had seen the car in the same condition that Playland's maintenance superintendent had been able to see it during the eleven years(R 205).

Playland gave no instructions to children, like Miss Brian, except as to the safety belt; and there was no guard or monitor to supervise the use of the ride(R 169).

Playland had grossed $225,000 in the eleven years of the ride's use (R 168, 200) and had paid about $18,000 to purchase the ride eleven years before the accident(R 215).

No question of inconsistency in the verdict was raised before the trial court, either at the time of the trial or by post-trial motion(R 341-46; 379-85).

From the judgment in favor of plaintiff Brian against Playland's insurer, but in favor of Herschell and its insurer against plaintiff and Playland's insurer, plaintiff took no appeal (Appendix, p. 17).

The sole appellant was the insurer of Playland, which appealed the judgment of $10,000 in favor of Brian and the dismissal of its third-party complaint for indemnity against Herschell and its insurer.

The Court of Appeals did not find that the special verdicts were inconsistent on their face. First, the Court found that "there is no evidence of negligent maintenance" on the part of Playland. Then it found that "any negligence by the operator or manufacturer had to arise out of the faulty design and a subsequent unreasonable failure to warn or remedy". (Appendix, pp. 13-14).

Noting that the jury had found no negligence on the part of the manufacturer Herschell or any breach of its warranty (Appendix, p. 14), the Court then stated that if there was a defect in design, "such fault must surely fall upon the manufacturer-designer as well as on the operator". (Appendix, p. 15).

The Court felt that the manufacturer Herschell must have known about the space in the floor board under the seat, but that "similarly, the operator must have known because ten years of operation and maintenance must have familarized him with every detail of the mechanism". (Appendix, pp. 15-16).

The Court concluded finally that the verdicts of lack of negligence and no breach of warranty by Herschell, but negligence on the part of the operator Playland, were "either inconsistent or unsupported by the evidence".[4]

The original decision of the Court of Appeals remanded the case for a new trial on all issues, thereby depriving the plaintiff of his judgment against Playland's insurer, as well as Herschell and Utica of the judgment exonerating them.(Appendix, p. 16).

On petition for clarification and for rehearing, the Court of Appeals corrected its judgment to provide for a new trial only of the issues between plaintiff and the original defendant, and between the original defendant and the manufacturer Herschell and its insurer.(Appendix, pp. 17-18).

ARGUMENT

The Court of Appeals simply disagreed with the jury that, on this record, Playland could be negligent, and, at the same time, the manufacturer Herschell be not negligent nor have breached its warranty. But, the jury's special verdicts were consistent on their face and were consistent with the record.

The Court of Appeals did not find that there was no evidence to support the jury's verdicts in favor of peti-

[4] Appendix, p. 16. The Court stated that "the special verdicts of negligence (were) in favor of the operator (Playland)", but that is obviously an inadvertent error.

tioners. The Court merely found that it was either inconsistent to hold Playland negligent and Herschell not negligent, or that there was no support for the verdicts in favor of Herschell.

But this was an invasion of the province of the jury, which could easily have concluded that Playland's operation of the ride for eleven years prior to the accident, and its observation of 1,500,000 passengers during those years, put Playland in the best position to judge the safety of the ride. Playland, as the owner-operator, could decide whether the ride should be continued in use five, ten or twenty years, and whether it should be modified. There were other duties, incumbent on Playland alone, that the jury could have found were neglected by Playland. (See pp. 4-5, above). The record does not support a conclusion that Playland could not be liable unless Herschell be likewise liable.[5]

The Court of Appeals was not free to search the record for proof inconsistent with the jury's verdicts, in order to take the case away from the jury. *Tennant vs Peoria P. N. Ry. Co.*, 321 US 29, 35 (1944).

This Court has held, in virtually the same situation, that "neither we nor the Court of Appeals can redetermine facts found by the jury . . . Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case

[5] *Mercer vs Theriot*, 377 U.S. 152, 156 (1964).

which will make the jury's finding inconsistent results in a collision with the Seventh Amendment".[6]

This rule has been followed by the Court of Appeals for the Third Circuit, and the decision in this case is in conflict with that decision.[7]

Although the judgment of the Court of Appeals ordered a remand for a new trial, the disturbance of the jury's verdict merely because the court was in disagreement with the jury's findings, depriving Brian of his judgment against Playland's insurer as well as Herschell and Utica of their judgment of exoneration, provides an appropriate question, whether, in the exercise of this court's "supervisory powers over the lower courts, the judgment of the Court of Appeals should be reversed in the interest of justice" [*Gibson vs Lockheed Aircraft*, 350 US 356, 357 (1956)], and because the Court of Appeals exceeded its constitutional authority under the Seventh Amendment.

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Of Counsel

March, 1965

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[6] *Atlantic & Gulf Stevedores, Inc. vs Ellerman Lines, Ltd.*, 369 US 355, 358-59, 364 (1962); *Gallick vs Baltimore & Ohio R. Co.*, 372 US 108, 119 (1963); *Reiner vs Bankers Security Corp.*, 305 F2d 189, 193 (CA 3-1962).

[7] *Reiner vs Bankers Security Corp.*, 305 F2d 189 (CA 3-1962). This may arise from the Fifth Circuit's erroneous interpretation of this Court's decision in *Ellerman* as involving solely the matter of the seaworthiness of a vessel. *Jefferson vs Taiyo Katun*, 310 F2d 582 (CA 5-1962).

VERDICT

"We the Jury Find:

"1. Was Playland Amusement Co., Inc. guilty of negligence?	Yes
"2. If your answer to No. 1 is in the affirmative, was its negligence a proximate cause of the injuries complained of?	Yes
"3. Was Allan Herschell Co., Inc. guilty of negligence?	No
"4. If your answer to No. 3 is in the affirmative, was its negligence a proximate cause of the injuries complained of?	
"5. Did Allan Herschell Co., Inc. breach its warranty to Playland Amusement Co., Inc.?	No
"6. If your answer to No. 5 is in the affirmative, was this breach of warranty a proximate cause of the injuries complained of?	
"7. Was Nancy Brian guilty of negligence?	No
"8. If your answer to No. 7 is in the affirmative, was her negligence a proximate cause of the injuries complained of?	
"9. What is the total amount of damages suffered by Nancy Brian as a result of this accident?	$10,000.00

Dated: June 28, 1963

(signed) Mrs. Ruth A. Sherman

Foreman"

Opinion of the Court of Appeals

WISDOM, Circuit Judge: Multi-party lawsuits, with complicated questions involving indemnification and contribution, justify the submission of special interrogatories to a jury in place of a request for a general verdict. In this case, unfortunately, the special interrogatories resulted in inconsistent verdicts betraying a failure or refusal of the jury to understand all of the issues. Because of a basic inconsistency in the jury's special verdicts, we reverse the entire complex imbroglio for a new trial.

The Whizzer is an amusement ride at Pontchartrain Beach in New Orleans. It is owned and operated by Playland Amusement, Inc. May 4, 1961, Nancy Brian, age fifteen, was riding on the Whizzer. By wedging her foot into a small open space in the floor under her seat she managed to entrap it where it was injured by the carriage while she was "Whizzing".

Under the aegis of the Louisiana Direct Action Statute, L.S.A.-R.S. 22:655 now, happily, interred, Donald Brian, Nancy's father, brought this diversity action on her behalf claiming liability for negligence against the United States Fidelity and Guaranty Co., the public liability insurer of Playland. United States Fidelity and Guaranty Co. pleaded over, naming Allan Herschell Company, Inc., the designer and manufacturer of the Whizzer, and Utica Mutual Insurance Co., the insurer of Herschell, as third party defendants. United States Fidelity and Guaranty Co. sought indemnification or, at

least, contribution based on the negligence of the manufacturer or breach of warranty. The plaintiff then amended his complaint to include Herschell and Utica as original defendants.

Herschell designed the Whizzer and sold it to Playland in 1951. During ten years of using the Whizzer, Playland had complete control of the operation and maintenance of the ride. There were no changes made in the ride save the addition of headrests which were designed by Herschell and installed by Playland.

The Whizzer, as it was designed, as it was manufactured and delivered to Playland, and as it was operated on the day of the accident, contained floorboards in all of its cars. For the front seat in all cars the floorboard did not extend all the way underneath the seat. Rather, a small opening was left into which a rider with a long leg and small foot might place his foot by stretching his leg underneath his seat. The opening was present on all Whizzer cars from the time of delivery until the time when the floorboards were extended after the accident. It was this opening into which young Nancy Brian placed her foot.

Liability for negligence in Louisiana is based on the standard of the reasonably prudent man in the given circumstances. In the case before us, there is no evidence of negligent maintenance; the Whizzer was in essentially the same condition on the day of the accident as it was when it was manufactured. Any negligence by the operator or manufacturer had to arise

out of the faulty design and a subsequent unreasonable failure to warn or remedy. Nevertheless, the jury returned a special verdict of negligence in favor of the operator while holding the manufacturer blameless. In addition, the jury found that the manufacturer had not breached its warranty obligations under Article 2476 of the Civil Code[1] and that Nancy Brian was not guilty of contributory negligence.

The operator of an amusement park is not an insurer for all accidents which occur on the premises but he must use care commensurate with the dangers of the business. In Louisiana the operator of an amusement ride is not a common carrier and is not specifically held to the high standards of care reserved for such carriers.[2] *Waguespack v. Playland Corp.*, La.App. 1940, 195 So. 368. While he is held only to a standard of ordinary care, ordinary care must be defined in terms of the special circumstances and the special dangers arising from the operation of such a ride. Reasonable conduct must be defined in light of the knowledge that amusement rides have inherent dangers owing to speed or mechanical complexities. They are operated for profit and are held out to the public to be safe. They are operated in the expectation that thousands of patrons, many of them children, will occupy their seats.

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1 Article 2476. Warranty against eviction and against latent defects

"Article 2476. The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices."

2 The district judge, in his lengthy instruction, mistakenly characterized the operator of an amusement ride as a common carrier. It is perhaps the misimpression of a higher duty of care which brought about the jury's inconsistent verdicts.

Indeed the distinction between those who are common carriers and those who are not may be largely illusory since the special duty of care laid to common carriers may be nothing more than a recognition of the special circumstances surrounding the operation of a carrier which makes its facilities available for hire. See 2 Harper & James, The Law of Torts §16.14 at 947 (1956). "What is required is merely the conduct of the reasonable man of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding a greater amount of care." Prosser on Torts § 33 at 147 (1955).

In any event, the same circumstances which require greater care on the part of the amusement park operator apply as well to the manufacturer-designer of the amusement park rides. The dangers and their foreseeability are the same: both are creating risks to thousands of passengers for monetary gain.

If the fault for the accident in the case before us arises from the design of the Whizzer, such fault must surely fall upon the manufacturer-designer as well as on the operator. It is the latter who is the expert in matters of design: it is he who has initiated the faulty design. Nor can the manufacturer be held less responsible for recognizing a defect in the design. There was no question of not knowing about the small space behind the floorboard. The manufacturer must have known, since he designed and built the ride in this manner. Similarly, the operator must have known, be-

cause ten years of operation and maintenance must have familiarized him with every detail of the mechanism. The relevant consideration is not actual knowledge of the space under the seat but rather the knowledge or recognition that the space was dangerous, the foreseeability of injury arising from the existence of that space. Here too the manufacturer was in at least as good a position to foresee injury as was the operator. Both knew that thousands of passengers of all sizes, shapes, and inclinations would use the ride; if the injury to Nancy Brian was reasonably foreseeable, it was foreseeable to both.

Given the state of the fact and proofs, we are forced to conclude that the special verdicts of negligence in favor of the operator and freedom from negligence for the manufacturer-designer are either inconsistent or unsupported by the evidence.[3] Inconsistent special verdicts cannot stand; if one verdict is not demonstrably in error, there must be a new trial. We cannot convince ourselves that the misimpression which led the jury to this error did not taint its other judgments as well. In the interest of justice, we REVERSE the judgment and REMAND for a new trial of all the issues.

[3] It would be possible to render the verdicts consistent by inferring that the jury found the operator negligent in the maintenance of the ride. The total lack of evidence to support such a finding would doom the verdict just as surely as would any inconsistency. In addition, it is impossible for us to interpret the special verdicts as representing a judgment that the negligence of the operator was an intervening cause which cut the chain of causation started by the manufacturer's misdeeds. The district judge put the questions of negligence and proximate causation separately and the jury decided that the manufacturer was free from negligence.

JUDGMENT OF THE COURT OF APPEALS

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for a new trial of all the issues in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellees, Donald R. Brian, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 16, 1964

OPINION OF THE COURT OF APPEALS ON PETITION FOR CLARIFICATION OF DECISION AND REHEARING

PER CURIAM: In their petition for clarification and rehearing, the petitioners call to the attention of the Court that the plaintiff took no appeal from the judgment in favor of Allan Herschell Company, Inc. and Utica Mutual Insurance Company; that the order reversing the judgment and remanding "for a new trial of all the issues" should be clarified. The Court agrees with the petitioners on this point.

For purposes of clarification, therefore, the decision of this Court dated October 16, 1964, is herewith amended and modified by the substitution of the following sentence:

> "In the interest of justice, we reverse the judgments entered against the appellant on the main demand and the third party demand; we remand for a new trial of all the issues between the original plaintiff and the United States Fidelity and Guaranty Company and between the United States Fidelity and Guaranty Company and the third party defendants, Allan Herschell Company, Inc. and Utica Mutual Insurance Company."

for the last sentence, which read:

> "In the interest of justice, we reverse the judgment and remand for a new trial of all the issues."

In other respects, the petition is DENIED.